

**STATE OF MICHIGAN**  
**IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE**

NORKAN, INC

Plaintiff,

Hon. Brian R. Sullivan  
Case No: 18-006063-CB

-vs-

WESTFIELD INSURANCE COMPANY,  
an Ohio Corporation, and PROFESSIONAL  
ASBESTOS SERVICES, INC., a Michigan  
corporation,

Defendants.

**OPINON AND ORDER GRANTING PLAINTIFF'S**  
**MOTION FOR SUMMARY DISPOSITION**

Plaintiff filed a motion for summary judgment or in the alternative, default judgment. Plaintiff filed a complaint for account stated, supported by an affidavit, asserting it sold \$155,150.13 in goods to defendant Professional Asbestos Services, Inc. (PASI) on account over a period of many months. Plaintiff attached all the unpaid invoices, approximately 100 in total, to its motion. Plaintiff asserts PASI accepted the goods, did not return them, nor pay the invoices.

Plaintiff seeks summary disposition against defendant for payment of those invoices sold to defendant. Defendant responded with a general denial of the debt. Defendant filed an affidavit that it did not owe plaintiff the money. Defendant also asserted plaintiff lacks standing to sue defendant due to release.

The court grants plaintiff's motion for summary disposition on account stated.

### **Facts**

Norkan, Inc. (Norkan) is a supplier of asbestos abatement products. Professional Asbestos Services, Inc. (PASI) is a company that, among other things, removes asbestos from buildings and residences. Norkan, Inc. sold defendant about \$155,150.13 of product to PASI over time on account. PASI used the product to abate asbestos pursuant to its contract with the City of Detroit Building Authority. PASI never paid Norkan for that product. Each shipment was received by, signed for, and accepted by a representative of PASI. A copy of approximately 100 invoices was attached to plaintiff's motion.

PASI also obtained a bond from Westfield Insurance Co. as a requirement of its agreement with the City of Detroit.

In May of 2018, Norkan sued PASI for breach of contract, failure to make payment on a bond, account stated, and unjust enrichment for the sale of product by defendant, PASI. The amount of the outstanding invoices totaled \$155,150.13. Plaintiff also sued Westfield Insurance Co. on the bond defendant had with it for asbestos removal jobs.

The case was ordered into facilitation several times. However, defendant failed to appear and defendant did not participate on three separate facilitation dates: December 17, 2018, January 31, 2019 and February 13, 2019. Defendant's counsel filed, then withdrew, limited appearances which applied only to the facilitations, several times. Chaos ensued as a result of the intermittent appearances. After the failure of defendant to attend the first facilitation, plaintiff filed a motion to compel defendant's attendance. The court granted the motion. Facilitation was re-ordered but defendant still did not, and has not, attended any facilitation.

Norkan and Westfield did attend facilitation. They settled their case for \$32,000 at facilitation. That settlement amount is to be reduced from defendant's unpaid balance to plaintiff. The amount defendant owes to plaintiff, it alleges, after that reduction is \$123,150.13, plus interests, costs, and attorney's fees.

Norkan, Inc. and Westfield Insurance Co. entered into a written settlement agreement. Norkan provided Westfield Insurance Co. with a limited release/assignment for the payment of \$32,000 to Norkan, Inc. The settlement agreement also states that Norkan, Inc.:

“reserves its claims against Professional Asbestos Services, Inc., and any related parties, which claims are reduced by the amount paid by Westfield Insurance Co.”

Defendant contends, in opposition to defendant's motion for summary disposition, the release by defendant assigned all plaintiff's interest in the suit to Westfield Insurance Co. Defendant further states Norkan, Inc. lacks standing to sue

PASI because of the collection of the bond money and release. Finally, defendant claims the \$32,000 Westfield settlement satisfies plaintiff's entire \$155,150.13 balance.

The release and assignment of claim against Westfield, dated March 8, 2019, released Westfield Insurance Co. only. Norkan, Inc. was bound only "to the extent of payment" of \$32,000. Westfield Insurance Co.'s payment reduces PASI's obligation to plaintiff but does not satisfy it. Defendant's ground in opposition to plaintiff's motion for summary disposition is rejected and plaintiff's motion is granted.

#### **MCR 2.116(C)(10)**

A motion under MCR 2.116(C)(10) tests the factual sufficiency of a complaint. The trial court evaluates this motion for summary disposition by considering the affidavits, pleadings, depositions, admissions and other evidence submitted by the parties. MCR 2.116(G)(5). The court must consider the evidence in a light most favorable to the non-moving party. *Maiden v Rozwood*, 461 Mich 109, 120 (1999); *Rice v Auto Insurance Association*, 252 Mich App 25 (2002); *Ward v Franks Nursery and Crafts, Inc.*, 186 Mich App 120 (1990). If the proffered evidence fails to establish a genuine issue regarding any material fact the moving party is entitled to judgment as a matter of law. See MCR 2.116(C)(10), (G)(4); *Quinto v Cross and Peters Company*, 451 Mich 358 (1996).

If the opposing party fails to submit such evidence to establish a question of fact it cannot rely on the allegations or denial contained in the pleadings. Summary disposition in such cases is proper. See *SSC Associates Limited Partnership v General Retirement System of the City of Detroit*, 192 Mich App 360 (1991).

A party's pledge to establish an issue of fact at trial cannot survive summary disposition under (C)(10). *Maiden*, 461 Mich at 121. The court rule requires the adverse party to set forth specific facts at the motion showing a genuine issue for trial. The reviewing court must evaluate the motion by considering the substantively admissible evidence proffered in support and opposition of the motion. *Maiden*, 461 Mich at 121; *McCart v J Walter Thompson USA, Inc.*, 437 Mich 109, 115, note 4 (1991).

### **Account Stated**

An action for account stated is based on "an agreement between parties who have had previous transactions of a monetary character, that all the items of the accounts representing such transactions are true and that the balance struck is correct, together with a promise, express or implied, for the payment of such a balance." *Fisher Sand and Gravel Co. v Neal A. Sweebe, Inc.* 494 Mich 543, 554 (2013). The action is brought to "enforce a subsequent promise to pay on account." *Fisher*, 494 Mich at 561. An account stated, "is a contract based on assent to an agreed balance, and it is an evidentiary admission by the parties of the facts asserted in the computation and the promise by the debtor to pay the amount due." *Fisher*, 494 Mich at 557. Account stated

requires mutual assent, but “the parties to an account stated need not expressly assent to the sum due, as there are instances when assent may be inferred from the parties’ inaction.” *Fisher*, 494 Mich at 558. The parties assent is inferred from their conduct, rendering the account stated a contract in law.

Under MCL 600.2145, the moving party must file an affidavit for the amount due and serve it on defendant, along with a copy of the complaint. Plaintiff did so, references it in the complaint and attached the invoices to the brief in support of its motion for summary disposition.

Each delivery Norkan made on account to PASI was accompanied by an invoice. Each invoice was signed by a representative of PASI. Defendant accepted all invoiced deliveries made by plaintiff and provided a signature from a PASI representative on each Norkan invoice for the delivered product. This acceptance of goods by defendant indicates its assent to form a promise to pay the balance accrued on account stated. PASI’s failure to pay its balance on account constitutes a breach of contract. Plaintiff’s affidavit of account stated in its complaint and motion against PASI complies with MCL 600.2145.

Defendant asserts two arguments in opposition to plaintiff’s motion: (1) the settlement with Westfield released PASI; and (2) Plaintiff lacks standing due to the release with Westfield.

The settlement between plaintiff and Westfield is limited by its terms. It provides set off to Norkan for PASI limited to the amount Westfield paid to plaintiff. It does not satisfy defendant's entire debt to plaintiff nor eliminate plaintiff's standing. This argument of defendant is without merit and is rejected by the court.

Defendant also filed an affidavit stating it did not owe plaintiff the money. However, that general affidavit comprised only of a conclusion the debt is not owed is insufficient to satisfy defendant's duty in response to plaintiff's motion. The defendant cannot rest on mere or general denials but must "set forth specific facts showing there is a genuine issue of fact for trial." MCR 2.116(G)(4). Defendant failed to do this by a general, conclusory denial of debt. This answer is insufficient in law. MCR 2.116(G)(4).

Plaintiff's motion for summary disposition on account stated is granted. MCR 2.116(C)(10).

### **Unjust Enrichment**

Unjust enrichment is the "equitable counterpart" of a legal claim for breach of contract. *AFT Michigan v Michigan*, 303 Mich App 651, 677 (2014). A claim for unjust enrichment can be sustained when the parties are without a contract and defendant receives a benefit from plaintiff, resulting in an inequity to plaintiff by defendant retaining the benefit. *Id.* at 660. The law will imply a contract to prevent unjust enrichment.

*Morris Pumps v Centerline Piping, Inc.*, 273 Mich App 187, 195 (2006). In this case, the parties have a contract so unjust enrichment, an alternative count, does not apply.

### **Attorney Fees and Costs**

Plaintiff also requests attorney fees and costs; however, has failed to cite any statute, court rule, or case law to support their request. This court is not obligated to find case law or make arguments in support of a party's position. *Nat'l Waterworks, Inc. v Int'l Fidelity & Surety, Ltd.* 275 Mich App 256, 265 (2007). Plaintiff's request for attorney's fees and costs should be supported by evidence. Plaintiff can do so by further motion.

### **Conclusion**

There is no genuine issue of material fact that defendant owed plaintiff money on account for goods provided. Defendant was required to "set forth specific facts showing that there is a genuine issue for trial." MCL 2.116(G)(4) Defendant's affidavit simply denies being indebted to plaintiff and does not provide any specific facts showing that there is a genuine issue of material fact. Pursuant to MCL 2.116 (C)(10),(G)(4). For these reasons, summary disposition is granted. MCR 2.116(C)(10).

Plaintiff's motion for summary disposition is **GRANTED**. The request for attorney's fees and costs is subject to further motion.



Norkan, Inc. is entitled to a judgment against Defendant Professional Asbestos Services, Inc. in the amount of \$123,150.13, including set off from Westfield for the money it paid to Norkan under the bond; and

IT IS SO ORDERED.

/s/ Brian R. Sullivan 7/3/2019

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BRIAN R. SULLIVAN  
Circuit Court Judge

ISSUED: